No. 14-114

In the Supreme Court of the United States

DAVID KING, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, provides federal tax credits to help low- and moderate-income Americans purchase health insurance through state-specific marketplaces called "Exchanges." The Act provides that each State "shall * * * establish" an Exchange, 42 U.S.C. 18031(b)(1), and further provides that if a State does not establish the "required Exchange" for itself, the Secretary of Health and Human Services (HHS) "shall * * * establish and operate such Exchange within the State," 42 U.S.C. 18041(c)(1).

The formula for calculating the amount of the tax credit available to an eligible taxpayer is based in part on the cost of one or more insurance plans "offered in the individual market within a State" that the taxpayer, the taxpayer's spouse, or the taxpayer's dependents "enrolled in through an Exchange established by the State under [42 U.S.C. 18031]." 26 U.S.C. 36B(b)(2)(A); see also 26 U.S.C. 36B(c)(2)(A)(i). The Internal Revenue Service (IRS), through notice-and-comment rulemaking, interpreted Section 36B to make tax credits available both in States that establish Exchanges for themselves and in States that opt to allow HHS to establish the Exchanges in their stead. 26 C.F.R. 1.36B-1(k), 1.36B-2(a); see 77 Fed. Reg. 30,377 (2012).

The question presented is whether the IRS permissibly interpreted Section 36B to make federal premium tax credits available to taxpayers in every State.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 759 F.3d 358. The opinion of the district court (Pet. App. 42a-74a) is reported at 997 F. Supp. 2d 415.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2014. The petition for a writ of certiorari was filed on July 31, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub.

L. No. 111-148, 124 Stat. 119,[1] "to increase the number of Americans covered by health insurance and decrease the cost of health care." *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2580 (2012) (*NFIB*). Among the many measures designed to achieve Congress's goals, the Act provides tax credits to make health insurance affordable for millions of low- and moderate-income Americans. In this case, four Virginia residents who would prefer not to be eligible for credits challenge the availability of those credits under the Act.

a. Most Americans with private health coverage obtain it through an employer-sponsored group health plan. See Congressional Budget Office (CBO), *Key Issues in Analyzing Major Health Insurance Proposals* xi (Dec. 2008) (*Key Issues*). Such plans have long been subsidized through the Internal Revenue Code. In 2007, for example, the federal tax subsidy for employment-based health coverage was $246 billion. *Id.* at xi, 31. Federal law also ensures broad access to employer-sponsored plans by barring them from denying coverage or charging higher premiums based on a person's health status or medical history. *Id.* at 79-80; see 29 U.S.C. 1182; 42 U.S.C. 300gg-1(a) (2006).

Before the Affordable Care Act, however, Congress's efforts to make affordable health coverage widely available left a gap in the individual market—the market for people who do not receive coverage "through their employer, or from a government program such as Medicaid or Medicare." *NFIB*, 132 S. Ct. at 2580. Health insurance purchased in the indi-

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[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

vidual market generally did not receive favorable tax treatment. *Key Issues* 9. Moreover, federal law generally did not prevent insurers from increasing premiums, or denying coverage altogether, based on a person's medical condition or history. As a result, insurers routinely denied coverage or charged higher premiums to people with conditions as common as high blood pressure, asthma, and pregnancy. *47 Million and Counting: Why the Health Care Marketplace Is Broken: Hearing Before the Senate Comm. on Finance*, 110th Cong., 2d Sess. 52 (2008) (Statement of Professor Mark A. Hall); Ed Neuschler, *Policy Brief on Tax Credits for the Uninsured and Maternity Care* 3 (Jan. 2004).

Because of the high cost of policies sold in the individual market and restrictions on coverage, participation in that market was low even among people who lacked other coverage options. Of the 45 million people without access to coverage through an employer-sponsored plan or government program in 2009, only about 20% were covered by a policy purchased in the individual market. The other 80% were uninsured. *Key Issues* 46.

b. In Title I of the Affordable Care Act, Congress sought to increase access to affordable health insurance in the individual market through the mutually reinforcing effect of three interdependent measures: (1) nondiscrimination requirements, which bar insurers from denying coverage or charging higher premiums based on a person's medical condition or history, see 42 U.S.C. 300gg to 300gg-4; (2) the premium tax credits at issue here, which provide federal subsidies to help low- and moderate-income Americans purchase insurance in the individual market, see 26

U.S.C. 36B; and (3) the individual-coverage provision (sometimes called the "individual mandate"), which requires most individuals to pay a tax penalty if they do not maintain health coverage, see 26 U.S.C. 5000A.

The nondiscrimination rules ensure that consumers in the individual market—like those with access to employer-sponsored plans—can obtain coverage regardless of preexisting conditions or other risk factors. Congress determined, however, that the nondiscrimination rules standing alone would have encouraged people to "wait to purchase health insurance until they needed care," secure in the knowledge that they could not be denied coverage or charged higher rates. 42 U.S.C. 18091(2)(I). This "adverse selection" would have forced insurers to increase premiums to account for a risk pool skewed toward the consumers most likely to need care, driving even greater numbers of healthy individuals out of the market in a self-reinforcing "death spiral"—a "disastrous" result that played out in several States that enacted standalone nondiscrimination requirements in the 1990s. *NFIB*, 132 S. Ct. at 2614 (Ginsburg, J., concurring in part and dissenting in part). Those States "suffered from skyrocketing insurance premium costs, reductions in individuals with coverage, and reductions in insurance products and providers" as many insurers stopped offering coverage altogether. *Ibid.* (citation omitted). Congress was well aware of the States' experiences, and it sought to "minimize this adverse selection and broaden the health insurance risk pool" by enacting the tax credit and individual-coverage provisions. 42 U.S.C. 18091(2)(I).

The tax credits subsidize individual-market insurance policies purchased by eligible individuals with

incomes between 100% and 400% of the federal poverty level. 26 U.S.C. 36B. For eligible recipients of credits with incomes between 100% and 250% of the federal poverty level, supplemental payments are made to their insurers to help cover cost-sharing expenses, such as copayments and deductibles. 42 U.S.C. 18071. Those subsidies serve to provide "Affordable Coverage Choices for All Americans," Tit. I, Subtit. E, 124 Stat. 213, by extending to the individual market tax subsidies comparable to those that have long been available to employer-sponsored plans. And by making insurance broadly affordable, the tax credits also help to prevent adverse selection and preserve the stability of the insurance markets.

The individual-coverage provision requires most people to pay a tax penalty if they do not maintain health coverage. 26 U.S.C. 5000A(a) and (b); see *NFIB*, 132 S. Ct. at 2580, 2600 & n.11. "But recognizing that individuals cannot be made to purchase what they cannot afford, Congress provided that the mandate would not apply if the cost of insurance exceeds eight percent" of a person's household income. *Halbig* v. *Burwell*, 758 F.3d 390, 419 (D.C. Cir. 2014) (Edwards, J., dissenting), reh'g en banc granted, No. 14-5018 (Sept. 4, 2014); see 26 U.S.C. 5000A(e)(1)(A). Absent the tax credits, "millions" of low- and moderate-income Americans would have fallen within that exception, *Halbig*, 758 F.3d at 395, undermining the viability of insurance markets and risking the death spirals that plagued earlier state efforts at reform. Section 5000A directly links the tax credits to the individual-coverage provision by providing that the unaffordability exemption to the requirement to maintain coverage or pay a tax penalty is based on the

cost of insurance after taking into consideration "the amount of the credit allowable under [S]ection 36B." 26 U.S.C. 5000A(e)(1)(B)(ii).

The nondiscrimination rules, tax credits, and individual-coverage provision thus work in tandem to achieve the Act's fundamental goals of expanding health-insurance coverage and promoting a functioning individual insurance market in each State. Because of that interdependence, Congress provided that all three sets of provisions would take effect on the same date, January 1, 2014. §§ 1255, 1401(e), 1501(d), 124 Stat. 162, 220, 249; see § 10103(f)(1), 124 Stat. 895 (redesignating Section 1253 as Section 1255).

c. The Affordable Care Act implements its reforms to the individual market in large measure through "Exchanges," which are state-specific marketplaces where consumers can compare and purchase individual health plans. 42 U.S.C. 18031(d). Exchanges are the mechanism through which eligible individuals obtain tax credits and cost-sharing subsidies: Only plans purchased through the Exchange in their State are eligible for credits and subsidies, 26 U.S.C. 36B; the Exchange facilitates determinations regarding eligibility for those payments, 42 U.S.C. 18081; and the Exchange facilitates the payment of subsidies and advance payment of tax credits directly to an eligible taxpayer's insurer on a monthly basis, 42 U.S.C. 18082. Before Congress passed the Act, the CBO projected that 78% of the individuals who would buy insurance through Exchanges would receive tax credits, and that those credits, on average, would cover nearly two-thirds of the recipients' premiums. CBO, *An Analysis of Health Insurance Premiums Under*

the Patient Protection and Affordable Care Act 24 (Nov. 30, 2009) (*Premium Analysis*).

The Act provides that "[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an 'Exchange')." 42 U.S.C. 18031(b)(1). In order to afford "State flexibility," however, the Act furnishes alternative ways for that requirement to be satisfied. 42 U.S.C. 18041. First, a State can "elect[]" to set up the Exchange for itself. 42 U.S.C. 18041(b). Second, if a State does not elect to create the "required Exchange" itself, or fails to have its exchange "operational by January 1, 2014," then the Secretary of Health and Human Services (HHS) "shall * * * establish and operate such Exchange within the State." 42 U.S.C. 18041(c).

An exchange operated by HHS is known as a "[f]ederally-facilitated Exchange." 45 C.F.R. 155.20 (emphasis omitted). Although the federally-facilitated Exchanges are operated by HHS, each one is a state-specific marketplace. Among other things, insurers offering coverage on the Exchange in a particular State must be licensed by that State, 42 U.S.C. 18021(a)(1)(C)(i), and premiums for plans offered on the Exchange are based on rating areas and risk pools unique to the State, 42 U.S.C. 18021(a)(4), 18032(c).

The Internal Revenue Service (IRS) is responsible for implementing 26 U.S.C. 36B, the provision authorizing tax credits for qualifying individuals who purchase insurance on an Exchange. Section 36B(a) provides that a tax credit "shall be allowed" for any "applicable taxpayer," 26 U.S.C. 36B(a), a term that is defined—without regard to the taxpayer's State of residence or the entity operating that State's Ex-

change—as "a taxpayer whose household income for the taxable year equals or exceeds 100 percent but does not exceed 400 percent" of the federal poverty line. 26 U.S.C. 36B(c)(1)(A). Section 36B(b) then provides that the amount of the credit available to a particular taxpayer is based in part on the premium the taxpayer paid for a health insurance plan "offered in the individual market within a State" that was "enrolled in through an Exchange established by the State under [42 U.S.C. 18031]." 26 U.S.C. 36B(b)(2)(A).[2]

The IRS, through notice-and-comment rulemaking, interpreted Section 36B to make credits available to all eligible individuals who purchase insurance on an Exchange—both in States that establish the Exchanges for themselves and in States that are unable to do so or that opt to allow HHS to establish the Exchanges in their stead. 26 C.F.R. 1.36B-1(k), 1.36B-2(a); see 77 Fed. Reg. 30,377 (May 23, 2012).

d. Thus far, 16 States and the District of Columbia have established Exchanges for themselves, while 34 States have opted to allow HHS to do so in their stead. Pet. App. 7a. Approximately 7.3 million people have obtained insurance through the Exchanges. Sylvia Matthews Burwell, Secretary, HHS, The Affordable Care Act is Working (Sept. 23, 2014). Roughly 5.4 million people secured coverage through a federally-facilitated Exchange. Amy Burke et al., *ASPE Research Brief: Premium Affordability, Competition, and Choice in the Health Insurance Marketplace, 2014*, at 3 (June 18, 2014). Nearly 90% of those peo-

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[2] Another subparagraph of Section 36B cross-references this provision and uses a similar formulation in defining a "coverage month" for which a credit is available. 26 U.S.C. 36B(c)(2)(A)(i).

ple are relying on tax credits—an even greater proportion than the CBO projected. See p. 6, *supra*. The credits cover the lion's share of premiums for most recipients—an average of 76%. *Ibid.* The average subsidy from the tax credits and accompanying cost-sharing payments in 2014 is expected to be $4,700. CBO, *The Budget and Economic Outlook: 2014 to 2024*, at 108 Tbl. B-2 (Feb. 2014).

2. Petitioners are four individuals who live in Virginia, which opted to allow HHS to establish and operate its Exchange. Pet. App. 1a, 9a; see Va. C.A. Amicus Br. 19-21. Petitioners allege that, absent the credits made available under Section 36B, they could forgo insurance without paying a tax penalty because they would fall within the individual-coverage provision's unaffordability exemption. Pet. App. 8a, 10a-11a; see 26 U.S.C. 5000A(e). Petitioners further allege that the availability of credits means that they can obtain affordable coverage on the Virginia Exchange, and that the individual-coverage provision therefore requires them to purchase insurance or pay a tax penalty. Pet. App. 11a.

Seeking to avoid that result, petitioners filed this suit in federal district court. Petitioners assert that Congress unambiguously precluded the IRS from providing tax credits not only to them, but also to the millions of other residents of States with federally-facilitated Exchanges who rely on credits to make their coverage affordable. Petitioners' assertion rests on language in two subparagraphs in Section 36B providing that the amount of the available credit is calculated in part based on the cost of health plans that were "enrolled in through an Exchange *established by the State* under [42 U.S.C. 18031]." 26

U.S.C. 36B(b)(2)(A) (emphasis added); see also 26 U.S.C. 36B(c)(2)(A)(i). According to petitioners, that language in the formula for calculating federal tax credits must be read as limiting the availability of credits to residents of States that elect to create their own Exchanges, and to exclude all residents of States that opt to allow HHS to create the Exchanges in their stead.

3. The district court granted the government's motion to dismiss. Pet. App. 42a-74a. The court concluded that both petitioners and the IRS offered "seemingly credible constructions of the language" in Section 36B(b)(2)(A) "[v]iewed in a vacuum." *Id.* at 63a. But the court found that "when statutory context is taken into account, [petitioners'] position is revealed as implausible." *Ibid.* The court further held that even if it "[a]ssum[ed] for the sake of argument that the text of [S]ection 36B is ambiguous," it would uphold the IRS regulation as a permissible construction entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984) (*Chevron*). Pet. App. 71a-74a.

4. A unanimous panel of the court of appeals affirmed. Pet. App. 1a-41a. It held that the government had "the better of the statutory construction arguments," including both those based on Section 36B's text and those based on the broader statutory context. *Id.* at 18a; see *id.* at 22a, 25a. But the court concluded that the statute is ambiguous and upheld the IRS's interpretation as a "permissible construction" under *Chevron*. *Id.* at 33a. Judge Davis concurred. *Id.* at 34a-41a. He concluded that the IRS's interpretation is not merely permissible, but the only construction

consistent with "a holistic reading of the Act's text and proper attention to its structure." *Id.* at 36a.

5. On July 22, 2014, the same day the Fourth Circuit decided this case, a divided panel of the D.C. Circuit issued a decision in a materially identical case. *Halbig*, 758 F.3d at 392. The *Halbig* panel majority held that Section 36B unambiguously precludes the IRS from providing tax credits to residents of States with federally-facilitated Exchanges. *Id.* at 394. Judge Edwards dissented, explaining that the IRS's contrary interpretation "easily survives review under *Chevron*." *Id.* at 413.

On September 4, 2014, the D.C. Circuit granted the government's petition for rehearing en banc in *Halbig* and vacated the panel's judgment. Order at 1, No. 14-5018. The en banc court ordered full briefing and scheduled oral argument for December 17, 2014. *Ibid.*

ARGUMENT

Petitioners' principal basis for seeking a writ of certiorari was their contention (Pet. 11-22) that this Court's intervention was needed to resolve the conflict between the decision below and the panel decision in *Halbig* v. *Burwell*, 758 F.3d 390 (D.C. Cir. 2014). The D.C. Circuit has now granted rehearing en banc in *Halbig*, eliminating the conflict and any uncertainty created by the *Halbig* panel's decision. Petitioners identify no sound reason for this Court to depart from its usual practice by taking up the question presented in the absence of a disagreement among the courts of appeals and while the D.C. Circuit's en banc proceedings remain pending.

Review is also unwarranted because the court of appeals' decision is correct. Congress determined that the tax credits at issue here are essential to the

Affordable Care Act's goals of making affordable health coverage available to all Americans and ensuring functional insurance markets. Petitioners' argument (Pet. 24-33) that the Act denies those credits to millions of people in 34 States is contrary to the Act's text and structure and would render the Act unrecognizable to the Congress that passed it. "Without the federal subsidies, individuals would lose the main incentive to purchase insurance inside the exchanges, and some insurers may be unwilling to offer insurance inside of exchanges. With fewer buyers and even fewer sellers, the exchanges would not operate as Congress intended and may not operate at all." *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2674 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

The Act provides that each State "shall * * * establish an American Health Benefits Exchange." 42 U.S.C. 18031(b)(1). But, in a provision expressly designed to respect the sovereign dignity of each State by affording "State flexibility," 42 U.S.C. 18041, the Act provides two ways for that requirement to be satisfied. First, a State may elect to create the Exchange on its own. 42 U.S.C. 18041(b). Alternatively, if a State does not elect to establish the "required Exchange" itself, then HHS will "establish and operate such Exchange within the State." 42 U.S.C. 18041(c)(1). Either choice satisfies Section 18031(b)(1)'s requirement that each State "shall * * * establish an [Exchange]." The text of the Act thus makes clear that an Exchange established by HHS in a State's stead is, as a matter of law, "an Exchange established by the State."

That interpretation harmonizes the Act's text, structure, and purpose. Petitioners' reading, in contrast, would transform the Act into a hash of superfluities, absurdities, and internal contradictions. It would obstruct the Act's express purpose by denying affordable insurance to millions of Americans. It would thwart the operation of the Act's interdependent reforms and gut the Exchanges through which those reforms are implemented. And it would destroy the Act's model of cooperative federalism by transforming the Act's promise of "State flexibility" into a threat that a State may forgo establishing an Exchange for itself only at the price of crippling its insurance market and depriving its citizens of the tax credits at the heart of the Act. The Act unambiguously forecloses that construction. At a minimum, the IRS's interpretation is a permissible one meriting deference under *Chevron*.

1. The text of the Affordable Care Act makes clear that when HHS establishes the Exchange for a particular State, that Exchange is, as a matter of law, "an Exchange established by the State" under Section 18031. That conclusion becomes inescapable when the relevant text is considered, as it must be, "not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" *Abramski* v. *United States*, 134 S. Ct. 2259, 2267 (2014) (quoting *Maracich* v. *Spears*, 133 S. Ct. 2191, 2209 (2013)). Petitioners' blinkered focus on a single phrase in two subparagraphs of Section 36B considered in isolation ignores this "fundamental canon of statutory construction." *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012) (quoting *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)).

a. The Affordable Care Act provides that "[e]ach State shall * * * establish an [Exchange]." 42 U.S.C. 18031(b)(1). The Act then furnishes alternative means by which, at each State's option, that requirement may be met. Section 18041, which expressly grants "State flexibility," allows a State to "elect[]" to establish the Exchange itself, but provides that if a State does not elect to create the "*required Exchange*" or is unable to do so, then HHS "shall * * * establish and operate *such Exchange* within the State." 42 U.S.C 18041(b) and (c)(1) (emphasis added). The use of the word "such" denotes that the Exchange established by HHS *is* the "required Exchange" that the State would have established had it elected to do so. See Black's Law Dictionary 1570 (9th ed. 2009) ("such" means "[t]hat or those; having just been mentioned"). And because a federally-facilitated Exchange thus satisfies Section 18031(b)(1)'s requirement that "[e]ach State shall * * * establish an [Exchange]," the Act's text makes clear that an Exchange created by HHS is, as a matter of law, "an Exchange established by the State."

The statutory definition of "Exchange" confirms that when a State does not set up the "required Exchange" for itself, HHS steps into its shoes and creates "an Exchange established by the State" in its stead. The Act provides that "[t]he term 'Exchange' means an American Health Benefit Exchange *established under [42 U.S.C. 18031]*." 42 U.S.C. 300gg-91(d)(21) (emphasis added); see 42 U.S.C. 18111 (incorporating this definition into Title I of the Act). As petitioners do not dispute, a federally-facilitated Exchange is an "Exchange" within the meaning of the Act. Therefore, although it is Section 18041 that pro-

vides the mechanism for HHS to set up and operate the required Exchange when a State opts not to do so, that federally-facilitated Exchange is, "by definition under the statute," Pet. App. 64a, deemed to be "established under [Section 18031]"—the provision directing that "*[e]ach State* shall * * * establish an [Exchange]." 42 U.S.C. 18031(b)(1) (emphasis added).

Petitioners and their amici nonetheless insist the "plain language" of Subsections 36B(b)(2)(A) and (c)(2)(A) unambiguously forecloses this reading. They contend that an Exchange established by HHS cannot be "an Exchange established by the State" within the meaning of the Act, and that federal tax credits therefore cannot be made available to Americans who purchase insurance on federally-facilitated Exchanges. Pet. 12; see Cornyn Amicus Br. 4-8; Okla. Amicus Br. 4; Pac. Research Inst. Amicus Br. 5-9. But the "plain meaning that [this Court] seek[s] to discern is the plain meaning of the whole statute, not of isolated sentences." *Beecham* v. *United States*, 511 U.S. 368, 372 (1994); accord *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."). Congress is "always" free to give statutory terms a "broader or different meaning" than they would otherwise have. *Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1707 (2012). And, as explained above, the definitional and other directly applicable provisions of the Act—including provisions cross-referenced in Section 36B itself—demonstrate that the Act treats an Exchange established by HHS in a State's stead as an Exchange "established by the State."[3]

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[3] Petitioners object (Pet. 26) that the Act does not expressly provide that an Exchange created by HHS is "deem[ed]" to be an

Petitioners also assert (Pet. 25) that the IRS's reading renders "the modifier 'established by the State'" superfluous. That is incorrect. An Exchange is a state-specific marketplace, and the relevant provision of Section 36B includes the phrase "established by *the* State" because it is referring to the Exchange in the specific State mentioned earlier in the same sentence. The formula for tax credits depends on "the monthly premiums * * * for [one] or more qualified health plans offered in the individual market within *a State* * * * which were enrolled in through an Exchange established by *the State* under [42 U.S.C. 18031]." 26 U.S.C. 36B(b)(2)(A) (emphasis added); see 26 U.S.C. 36B(c)(2)(A) (cross-referencing Section 36B(b)(2)(A)). The Act's other references to an "Exchange established by the State" likewise serve simply to refer to the Exchange in a particular State, typically identified elsewhere in the same provision.[4]

Exchange established by the State. But Congress was not required to use petitioners' preferred formulation, and the fact that it "could have accomplished the same result by phrasing the statute differently" is not reason to disregard "the statute *as written*." *United States* v. *Aguilar*, 515 U.S. 593, 604 (1995). Petitioners also note that the Act does not say that HHS "shall be treated as" a State, the formulation another provision uses to afford territories assistance in establishing Exchanges—though not, importantly, for purposes of Section 36B's tax credits. 42 U.S.C. 18043(a)(1). But the government's position is not that HHS is treated as a State in establishing an Exchange; HHS, for example, is not eligible for the grants made available to "States" (and territories) to establish Exchanges. 42 U.S.C. 18031(a), 18043(a)(1). Rather, the Act provides that the federally-facilitated Exchange for a State satisfies the statutory requirement that "[e]ach State shall * * * establish an [Exchange]." 42 U.S.C. 18031(b)(1).

[4] See 42 U.S.C. 1396a(gg)(1) (providing that certain requirements apply to a Medicaid program adopted by "*a State*" until

In contrast, the provisions of Section 36B that discuss Exchanges as a general category (rather than the Exchange in a particular State) do not contain the same modifier. Those provisions also concern the administration of the tax credits, and if petitioners were correct that the modifier "established by the State" serves to restrict credits to residents of States that established Exchanges for themselves, the same limitation would have been repeated throughout Section 36B. But no such restriction appears: All of Section 36B's generic references to Exchanges simply refer to "an Exchange." 26 U.S.C. 36B(d)(3), (e)(3) and (f)(3).

In any event, "the canon against surplusage 'assists only where a competing interpretation gives effect to every clause and word of a statute.'" *Marx* v. *General Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013) (citation omitted). The canon provides no help here because

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HHS determines that "an Exchange established by *the State*" is "fully operational"); 42 U.S.C. 1396w-3(b) (providing that "*[a] State* shall establish procedures" for coordinating between certain state programs and "an Exchange established by *the State*"); 42 U.S.C. 1397ee(d)(3)(B) and (C) (providing that "[w]ith respect to *each State*," HHS must make specified certifications with respect to health plans "offered through an Exchange established by *the State*" and requiring "*the State*" to establish procedures for enrolling eligible children in such plans); 42 U.S.C. 18031(f)(3)(A) (providing that "*[a] State* may elect to authorize an Exchange established by *the State*" to contract with eligible third-parties to carry out Exchange functions); 42 U.S.C. 18032(f)(1)(A) (defining a "qualified individual" as a person who, among other requirements, "resides in *the State* that established the Exchange") (all emphases added). One provision in Title VI of the Act, § 6005, 124 Stat. 698, which is otherwise unrelated to Exchanges, refers more generally to "an exchange established by *a* State under [42 U.S.C. 18031]." 42 U.S.C. 1320b-23(a)(2) (emphasis added).

petitioners' interpretation does not "give[] effect to every word" of the relevant provisions of Section 36B. *Ibid.* Those provisions refer to "an Exchange established by the State under [Section] 1311 [42 U.S.C. 18031]." 26 U.S.C. 36B(b)(2)(A) and (c)(2)(A). But the Act defines "Exchange" to mean an "American Health Benefit Exchange established under [S]ection 1311." 42 U.S.C. 300gg-91(d)(21). Because that definition already includes the phrase "established under [S]ection 1311," Section 36B's references to an Exchange "established * * * under [Section] 1311" are surplusage under petitioners' reading.

b. The broader structure and context of the Affordable Care Act confirm that the IRS correctly interpreted Section 36B. "[L]ike every Act of Congress," the Act "should not be read as a series of unrelated and isolated provisions," but rather as a "symmetrical and coherent regulatory scheme," *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569-570 (1995), in which all parts fit together as a "harmonious whole," *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). Petitioners' reading flouts that basic principle.

On petitioners' view, Congress imposed a fundamental geographic restriction on the availability of the federal tax credits at the heart of the Act through technical drafting in two subparagraphs of Section 36B setting forth the formula for calculating the amount of the credit available to a particular taxpayer. Yet at the same time, petitioners must ascribe to Congress complete indifference about how that purported restriction would interact with the remainder of the statutory scheme. As petitioners would have it, for example, Congress adopted reporting require-

ments for entities with nothing to report; required the creation of federally-facilitated Exchanges on which no one may lawfully purchase coverage; and imposed obligations on Exchanges, States, and HHS that are impossible to fulfill.

i. Start with Section 36B itself, the very provision in which petitioners perceive a categorical bar to credits for residents of States with federally-facilitated Exchanges. In a subsection entitled "[r]econciliation of credit and advance credit," Section 36B requires "[e]ach Exchange (or any person carrying out [one] or more responsibilities of an Exchange under [42 U.S.C. 18031(f)(3) or 18041(c)])" to report information to the IRS for use in the administration of the credits, including the "aggregate amount of any advance payment of such credit"; information needed to determine the taxpayer's "eligibility for, and the amount of, such credit"; and "[i]nformation necessary to determine whether a taxpayer has received excess advance payments" of the credit. 26 U.S.C. 36B(f)(3)(C), (E) and (F). Petitioners concede (Pet. 25) that this reporting requirement unambiguously applies to "*both* state- and HHS-established Exchanges." But there would have been no reason to require federally-facilitated Exchanges to make reports intended to facilitate the reconciliation of tax credits if those credits were available only on state-run Exchanges.[5]

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[5] Petitioners and the *Halbig* panel majority posit that some of the information required under Section 36B(f)(3) could be used for purposes other than administering the tax credit, including for enforcing the individual-coverage provision. *Halbig*, 758 F.3d at 403-404. But the express inclusion of federally-facilitated Exchanges in Section 36B(f)(3) cannot be explained on that ground because another statutory provision requires insurers to provide

ii. Other provisions of the Act confirm even more powerfully that when HHS establishes the "required Exchange" in a particular State's stead, that Exchange is, as a matter of law, "an Exchange established by the State." In virtually every instance in which that phrase or its equivalent appears in the Act, applying petitioners' interpretation would render the relevant provision impossible to apply, internally contradictory, or absurd.

First, if petitioners' reading were correct, federally-facilitated Exchanges would have no customers. The Act restricts access to individual-market policies sold on Exchanges to "qualified individuals." See 42 U.S.C. 18031(d)(2)(A), 18032(f). A "qualified individual" is defined as a person who, among other things, "resides in *the State that established the Exchange*." 42 U.S.C. 18032(f)(1)(A)(ii) (emphasis added). Accordingly, under petitioners' logic, there would be no "qualified individuals" eligible to purchase coverage in any of the 34 States with federally-facilitated Exchanges—and those Exchanges would serve no purpose.

Recognizing that Congress cannot have intended that absurd result, petitioners argued below that the provisions of the Act governing qualified individuals should be effectively "read * * * out of the [Act]" or "not appl[ied] * * * to federally-facilitated Exchanges." Pet. App. 65a. In other words, petition-

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the information necessary to enforce the individual-coverage provision. See 26 U.S.C. 6055. And any use of the information provided under Section 36B(f)(3) for that purpose is incidental to the only purpose Section 36B(f) itself expressly specifies: "[r]eco nciliation of *credit* and *advance credit*." 26 U.S.C. 36B(f) (emphasis added).

ers argued that the very language on which they rely to impose drastic limits on the availability of tax credits should be ignored when equivalent language appears in the Act's definition of "qualified individual." As the district court observed, petitioners' need to distort or disregard other statutory provisions "is a telltale sign that their reading of [S]ection 36B is wrong." *Ibid.*

The majority in the vacated panel decision in *Halbig* also strained to avoid the absurd result that federally-facilitated Exchanges would have no customers, declaring that individuals need not be "qualified" to shop on an Exchange. 758 F.3d at 405. But that reading contradicts both the obvious limiting function of the word "qualified" and other provisions of the Act. See, *e.g.*, 42 U.S.C. 18051(e)(1) and (2) (equating "a qualified individual" with a person "eligible for enrollment in a qualified health plan offered through an Exchange"). The *Halbig* panel majority's reading also yields further anomalies. It would eliminate both the Act's requirement that an individual be a resident of a State in order to shop on that State's Exchange and the exclusion of incarcerated persons from Exchanges. 42 U.S.C. 18032(f)(1)(A)(ii) and (B). Moreover, the Act allows a plan to be offered on an Exchange only if "the Exchange determines that making available such health plan through such Exchange is in the interests of *qualified individuals* and qualified employers in the State." 42 U.S.C. 18031(e)(1)(B) (emphasis added). Under the *Halbig* majority's view, a federally-facilitated Exchange could not make that determination because, by definition, there would be no "qualified individuals" in the Exchange's State.

Second, the Act provides that, as a condition of receiving federal Medicaid funds, a State may not tighten its Medicaid eligibility standards for adults between the date of the Act's passage and the date when "an Exchange established by the State under [42 U.S.C. 18031] is fully operational." 42 U.S.C. 1396a(gg)(1). That was intended to be a temporary transitional provision, as illustrated by the fact that the accompanying exception for States with budget deficits "end[ed] on December 31, 2013"—the day before the Exchanges become operational. 42 U.S.C. 1396a(gg)(3); see 18 U.S.C. 18031(b)(1). But petitioners' reading would transform this transitional device into a permanent freeze in States that opted for federally-facilitated Exchanges—and would mean that several States have violated their statutory obligations by tightening Medicaid eligibility standards after their federally-facilitated Exchanges became operational.

Third, the Act requires each State, as a condition of continued participation in Medicaid, to ensure coordination between the State's Medicaid program, its Children's Health Insurance Program (CHIP), and "an Exchange established by the State under [42 U.S.C. 18031]." 42 U.S.C. 1396w-3(b)(1)(B), (1)(D), (2) and (4). On petitioners' interpretation, a State with a federally-facilitated Exchange could not comply with those requirements—thus putting its Medicaid funding at risk—because no "Exchange established by the State" would exist.

Fourth, in the event of a funding shortfall in a State's CHIP program, the Act directs the State to enroll eligible children in coverage "offered through an Exchange established by the State under [42

U.S.C. 18031]." 42 U.S.C. 1397ee(d)(3)(B). A related provision requires HHS to review the plans "offered through an Exchange established by the State under [42 U.S.C. 18031]" and to certify plans that are suitable for enrollment of CHIP beneficiaries. 42 U.S.C. 1397ee(d)(3)(C). On petitioners' interpretation, those provisions would apply only in States that set up their own Exchanges—a result that contradicts the Act's express directive that HHS's obligation to review and certify "plans offered through an Exchange established by the State" applies "[w]ith respect to *each State*." *Ibid.* (emphasis added).

These provisions demonstrate that even if petitioners' reading of Subparagraphs 36B(b)(2)(A) and (c)(2)(A) were "plausible" when those provisions are "viewed in isolation," it is "untenable in light of [the statute] as a whole." *Department of Revenue of Or.* v. *ACF Indus., Inc.*, 510 U.S. 332, 343 (1994).

iii. Petitioners' reading also disregards the basic structural principle that Congress "does not alter the fundamental details of a regulatory scheme in * * * ancillary provisions." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). On petitioners' view (Pet. 3), the purported denial of tax credits to all residents of all States with federally-facilitated Exchanges is a "[c]ritical[]" and tremendously consequential feature of the Act. But no provision of the Act states directly and expressly that a State's residents lose their eligibility for credits unless the State establishes an Exchange for itself. Instead, petitioners contend that Congress imposed that fundamental limitation only indirectly, in subparagraphs setting forth the technical formula for calculating the amount of the credit that Section 36B(a)

expressly makes available to "applicable taxpayer[s]" without regard to State of residence. It is implausible to think that Congress would have adopted such a sweeping prohibition—and one so at odds with the text, structure, and purposes of the Act—in such an obscure fashion. Congress "does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468.[6]

c. Petitioners' interpretation of Section 36B would "frustrate Congress' manifest purpose" in enacting the Affordable Care Act—a purpose expressly set forth in the Act itself. *United States* v. *Hayes*, 555 U.S. 415, 427 (2009). The IRS's reading, in contrast, "give[s] effect to the statutory provisions, allowing them to accomplish their manifest objects." *Abramski*, 134 S. Ct. at 2269. "That alone provides more than sufficient reason" to reject petitioners' position. *Ibid.*

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[6] The *Halbig* majority dismissed this point, asserting that even under the IRS's interpretation, the formula in Section 36B "houses an elephant: namely, the rule that subsidies are only available for plans purchased through Exchanges." 758 F.3d at 401 n.4; see Pet. 31. That rule is not remotely comparable to what petitioners propose. The condition that tax credits are available only to subsidize insurance purchased through Exchanges simply sets forth the manner in which an eligible individual can obtain credits, and it furthers the Act's central goals and the role of the Exchanges in accomplishing them. That condition is also reflected in numerous other provisions of the Act. See, *e.g.*, 26 U.S.C. 36B(f); 29 U.S.C. 218b(a)(2); 42 U.S.C. 18032(e)(2), 18051(d)(3), 18052(a)(3), 18082(a)(1). By contrast, petitioners' sweeping geographic limitation on the availability of tax credits—which they locate exclusively in isolated phrases in subparagraphs (b)(2)(A) and (c)(2)(A)—is contrary to Section 36B(a) and to numerous other provisions of the Act, and would frustrate the Act's express purpose.

As the court of appeals explained, "denying tax credits to individuals shopping on federal Exchanges would throw a debilitating wrench into the Act's internal economic machinery" and obstruct the operation of the interdependent reforms through which Congress sought to address the previous failures of the individual market for insurance. Pet. App. 29a. The millions of individuals who now rely on federal tax credits obtained through federally-facilitated Exchanges would lose those subsidies, rendering illusory the statutory promise of furnishing, through tax credits, "Affordable Coverage Choices for *All* Americans." Affordable Care Act, Tit. I, Subtit. E, 124 Stat. 213 (emphasis added). Some of those individuals would remain subject to the individual-coverage provision despite the loss of credits—a result that Congress could not have intended. But millions of others would fall within the unaffordability exemption, *Halbig*, 758 F.3d at 395, thwarting the Act's stated objective of ensuring "near-universal coverage." 42 U.S.C. 18091(2)(D). And, as the *Halbig* majority conceded, the resulting loss of participants would "bode[] ill for individual insurance markets" in the affected States, 758 F.3d at 410 n.12, which would be threatened with the adverse-selection death spirals the Act was crafted to avoid.

Petitioners' interpretation would also eviscerate the Act's model of cooperative federalism. The Act provides grants and other "[a]ssistance to States" to encourage them to establish Exchanges for themselves. 42 U.S.C. 18031(a). But in a provision expressly designated as affording "State flexibility," the Act directs HHS to establish Exchanges in States that opt not to or are unable to do so. 42 U.S.C.

18041(c)(1). Petitioners' reading transforms that "flexibility" into a threat: a State may forgo establishing an Exchange for itself only at the price of crippling its insurance market and depriving its citizens of the tax credits at the heart of the Act. Petitioners would impose those consequences even on a State that chose to establish an Exchange for itself but was unable to have the Exchange "operational" by the statutory deadline. 42 U.S.C. 18041(c)(1). There is no reason to believe that Congress wanted to confront States with such a threatening choice, or would have designed an alternative certain to fail. It certainly would not have done so, as petitioners implausibly suggest (Pet. 4), in the name of federalism.[7]

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[7] The amici States advance a diametrically opposed, but equally implausible, rationale for the Act's purported denial of tax credits to residents of States with federally-facilitated Exchanges. On their view, Congress intended to allow States to prevent the operation of the Act's employer-responsibility provision, 26 U.S.C. 4980H. Okla. Amicus Br. 1-2, 5-16. The employer-responsibility provision imposes a tax on large employers that fail to offer affordable coverage to their employees, and it is triggered only when one or more full-time employees receive tax credits through an Exchange. 26 U.S.C. 4980H(a)(2) and (b)(1)(B). Petitioners' reading would thus allow a State, by declining to establish an Exchange for itself, not only to deny tax credits to its residents and exempt large numbers of them from the individual-coverage provision, but also to render the employer-responsibility provision largely inoperative within its borders. But Congress provided a specific mechanism to allow a State to obtain a waiver of key provisions of the Act—including the tax credits, the individual-coverage provision, and the employer-responsibility provision. 42 U.S.C. 18052(a)(1) and (2). Critically, such waivers are not available until 2017, and may be granted only if a State demonstrates, among other things, that it has adopted an alternative system that achieves comprehensive, affordable coverage for its residents. 42 U.S.C. 18052(a)(1) and (b)(1). That carefully crafted waiver provi-

Petitioners and their amici do not deny the disastrous consequences their reading would entail. To the contrary, that is what they seek. One of petitioners' amici has proclaimed that if their position is adopted, "the structure of the [Act] will crumble." Scott Pruitt, *ObamaCare's Next Legal Challenge*, Wall St. J., Dec. 2, 2013, at A17. No sound approach to statutory interpretation would attribute to Congress the intent to create such a self-annihilating scheme. See *ACF Indus.*, 510 U.S. at 340 (rejecting interpretation that would "subvert the statutory plan"); *Sullivan* v. *Hudson*, 490 U.S. 877, 890 (1989) ("Congress cannot lightly be assumed to have intended" a result that would "frustrat[e] * * * the very purposes" of the statute).

d. If Congress actually had intended to threaten to deny affordable insurance to the States' residents in order to encourage States to operate their own Exchanges—and to wreak havoc in the insurance markets in States that opted not to or were unable do so—there surely would have been some contemporaneous recognition of that critical feature during the lengthy congressional debate over the Act. Yet petitioners' reading lacks "any support in the legislative history." Pet. App. 71a; accord *id.* at 24a. To the contrary, that history shows that Congress understood that credits would be available in every State, including those that opted not to operate Exchanges for themselves. See *Halbig*, 758 F.3d at 425 (Edwards, J., dissenting) (citing sources). For example, that was the basis on which both the CBO and the

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sion would make little sense if a State could prevent the application of many of the Act's key provisions simply by declining to establish an Exchange for itself.

Joint Committee on Taxation (JCT) assessed the Act's tax and budgetary consequences. See CBO, *Premium Analysis* 3-4, 19-20; JCT, *Technical Explanation* 12 (Mar. 21, 2010). Those assessments were critical to the Act's framing and passage, see David M. Herszenhorn, *The Numbers Come Out Just Where Obama Wanted, With No Magic Involved*, N.Y. Times, Mar. 19, 2010, at A16, and as the head of the CBO later confirmed, they were prepared on the understanding that credits "would be available in every [S]tate, including [S]tates where the insurance exchanges would be established by the federal government." Letter from Douglas W. Elmendorf, Dir., CBO, to Rep. Darrell E. Issa, Chairman, Comm. on Oversight & Gov't Reform (Dec. 6, 2012).

Lacking evidence that any Member of Congress shared their understanding of the Act when it was passed, petitioners rely (Pet. 14, 33) on the text of an unenacted Senate bill. But to the extent it is relevant at all, that proposal further undermines petitioners' position. Contrary to petitioners' characterization, that bill did not propose to condition the availability of subsidies on a State's establishment of an Exchange. Instead, the bill would have allowed States to decide to adopt market reforms even before they became effective as a matter of federal law, and it expressly provided that tax credits would be available in a State that elected to enact such requirements *whether the State established its own Exchange or allowed HHS to establish the Exchange in its stead.* S. 1679, 111th Cong., 1st Sess. § 135(b) (2009); *id.* § 142 (proposing to add Section 3104 to the Public Health Service Act, 42 U.S.C. 201 *et seq.*).

2. At a minimum, the court of appeals correctly held that the IRS's interpretation is a reasonable one entitled to deference under *Chevron*. Section 36B authorizes the IRS to "prescribe such regulations as may be necessary to carry out the provisions of this section." 26 U.S.C. 36B(g); see also 26 U.S.C. 7805(a). An IRS regulation promulgated pursuant to that authority "falls squarely within the bounds of, and is properly analyzed under, *Chevron*." *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 714 (2011) (*Mayo Found.*). And for the reasons set forth above, the IRS's interpretation harmonizing the Act's text, structure, and purpose is entitled to deference. See *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132 ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.").

Petitioners and their amici maintain that the *Chevron* framework is inapplicable for three reasons, but all lack merit. First, petitioners contend (Pet. 28) that this issue is too important to be left to an administrative agency. But as this Court has explained, *Chevron* applies as much to "big, important" matters as to "humdrum, run-of-the-mill stuff." *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013). Unlike the cases on which petitioners rely, moreover, this is not a circumstance in which only one interpretation of the statute would invest an agency's regulations with broad impact. Cf. *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2444 (2014). *Either* interpretation of Section 36B has vast consequences. As demonstrated above, Congress itself made clear that tax credits are available in every State. But if there were any ambiguity, petitioners identify no sound reason why it should be

resolved in the first instance by courts rather than by the agency vested with authority to implement the Act's comprehensive reforms in numerous respects, including specific authority under Section 36B.

Second, petitioners and their amici assert that *Chevron* deference is displaced in tax law by the canon that "exemptions from taxation are to be construed narrowly," *Mayo Found.*, 131 S. Ct. at 715 (citation omitted). See Pet. 28-29; Pac. Research Inst. Amicus Br. 10-12. But this Court has expressly held that "[t]he principles underlying * * * *Chevron* apply with full force in the tax context." *Mayo Found.*, 131 S. Ct. at 713. It would be especially inappropriate to allow the canon to trump *Chevron* here, where petitioners themselves seek to expand exceptions to tax provisions, see 26 U.S.C. 4980H, 5000A(e)(1), and where the IRS's interpretation is the only one consistent with the fundamental principle that federal tax laws are "to be interpreted so as to give a uniform application to a nationwide scheme of taxation" rather than in a manner that is "dependent upon state law." *Burnet* v. *Harmel*, 287 U.S. 103, 110 (1932).

Third, petitioners argue (Pet. 30) that the IRS's interpretation of Section 36B is not entitled to deference because HHS has authority to implement other relevant provisions of the Act. But the IRS's regulation remains an exercise of its authority to interpret Section 36B of the Internal Revenue Code even though that interpretation was properly informed by the Act as a whole. In any event, *Chevron* applies where two agencies jointly charged with implementing a statute adopt a common interpretation, see *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557

U.S. 261, 277-278 (2009), and HHS has also concluded that tax credits are available on all Exchanges.[8]

3. The D.C. Circuit's grant of rehearing en banc eliminated the conflict between the *Halbig* panel decision and the decision below, and with it the principal ground on which petitioners rely in seeking this Court's review. See Pet. 11-22. Anticipating that possibility, petitioners briefly assert (Pet. 23) that review is warranted even in the absence of a circuit split. But neither petitioners nor their amici provide any sound reason for this Court to depart from its usual course by taking up the question presented while en banc proceedings remain pending—particularly because the *Halbig* panel majority did not consider the Fourth Circuit's decision in this case and failed to grapple with many of the statutory anomalies created by its interpretation.[9]

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[8] See 45 C.F.R. 155.20 (defining "Exchange" to include federally-facilitated Exchanges); 45 C.F.R. 155.340 (providing for all Exchanges to administer tax credits); see also 45 C.F.R. 155.340(f) (specifically addressing treatment of advance payments of credits through "a Federally-facilitated Exchange"). Congress contemplated that the IRS and HHS would coordinate their implementation of the Act, authorizing the IRS to promulgate regulations governing "the coordination of the credit allowed" under Section 36B with the HHS-administered "program for advance payment of the credit under [42 U.S.C. 18082]." 26 U.S.C. 36B(g)(1).

[9] After the petition was filed, a district court in Oklahoma adopted petitioners' reading of Section 36B and vacated the IRS regulation. *Oklahoma* v. *Burwell*, 11-cv-30 Docket entry No. 118, at 10-20 (E.D. Okla. Sept. 30, 2014) (Docket entry No. 118). The court stayed its order "pending resolution of any appeal," *id.* at 20, and the government filed a notice of appeal on October 2, 2014. The *Oklahoma* decision adds nothing to petitioners' contention that this Court's immediate review is warranted. This Court, of course, does not ordinarily grant review to resolve conflicts between

Petitioners and their amici argue that this Court's intervention is necessary to resolve purported "uncertainty" about the validity of the IRS regulation implementing Section 36B. Pet. 23; Mo. Liberty Project Amicus Br. 4-15; Okla. Amicus Br. 5-18. But petitioners primarily rely (Pet. 10, 18-19, 21) on a news story published the day after the decisions in this case and in *Halbig*, which hypothesized that "[t]he contradictory rulings * * * *could* inject uncertainty, confusion and turmoil into the health insurance markets." Robert Pear, *New Questions on Health Law as Courts Differ on Subsidies*, N.Y. Times, July 23, 2014, at A1 (emphasis added). Whatever the merits of that assessment when it was written, the grant of en banc review in *Halbig* vacated the panel's judgment and eliminated any uncertainty created by its decision.

Petitioners and their amici are also wrong to assert that immediate review is necessary because taxpayers receiving credits through federally-facilitated Exchanges are "potentially incurring thousands of dollars" in mounting liability for back taxes that would be owed in the event that this Court ultimately invalidated the IRS regulation. Pet. 19; see Okla. Amicus Br. 16. Precisely because tax cases often implicate strong reliance interests, "[t]he Internal Revenue Code gives the [IRS] discretion to decline to apply decisions of this Court retroactively." *Central Laborers' Pension Fund* v. *Heinz*, 541 U.S. 739, 748 n.4 (2004) (citing 26

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district courts and courts of appeals. See Sup. Ct. R. 10(a). And the *Oklahoma* court's brief analysis essentially adopts the reasoning of the vacated panel decision in *Halbig* and suffers from the same flaws, including a failure to consider the numerous textual and structural anomalies created by its reading. Docket entry No. 118, at 12-16.

U.S.C. 7805(b)(8)). If this Court were ever to adopt petitioners' position, it would "doubtless be an appropriate occasion for exercise of that discretion" by the IRS. *Ibid.*

Petitioners are of course correct (Pet. 18-21) that a decision striking down the IRS regulation would be tremendously disruptive for taxpayers, employers, insurers, the States, and other entities that have relied on the availability of credits. But the same argument could be made in any case in which a court of appeals rejects a challenge to a major statute or regulation: Challengers in such cases could always assert that "[u]ntenable uncertainty will persist" regarding questions of great practical significance "until this Court supplies a definitive answer." Pet. 23. But this Court routinely denies review in such cases—particularly where, as here, the issue is actively percolating in the lower courts.

Petitioners themselves appear to recognize (Pet. 24) that their subjective belief that the decision below erroneously rejected their arguments does not provide a basis for this Court's intervention. Their position thus ultimately rests on their prediction (*ibid.*) that, notwithstanding the grant of en banc review in *Halbig*, "the [IRS] Rule will be invalidated at some point by another court," creating a circuit conflict warranting this Court's review. Petitioners' counsel made precisely the same argument in *Halbig*, urging the D.C. Circuit to deny rehearing en banc because "it is quite probable that the Rule will be invalidated at some point by another court, even if a majority of the en banc court reverses the panel's decision." Opp. to Pet. for Reh'g En Banc at 10, No. 14-5018 (Aug. 18,

2014). The D.C. Circuit apparently rejected that contention, and this Court should do so as well.

As demonstrated above, petitioners' challenge to the IRS's interpretation of Section 36B is without merit. But even if petitioners' prediction proved correct and the en banc D.C. Circuit or another court of appeals ultimately adopted their view, this Court could then take up the question presented with the benefit of a more complete airing of the issues in the lower courts.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Although the government argued below that petitioners' complaint failed to establish standing, the court of appeals adopted a different interpretation of their allegations and found Article III satisfied. Pet. App. 10a-12a. The government does not contest the court of appeals' reading of petitioners' complaint or otherwise renew its challenge to their standing. For similar reasons, the government does not intend to challenge the *Halbig* panel's conclusion that the lead plaintiff in that case has standing. See 758 F.3d at 396-397.